84-394

Office-Supreme Court, U.S.
FILED
SEP 11 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GORDON M. KENNGOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE J. COTSIRILOS
ANN C. TIGHE
COTSIRILOS & CROWLEY, LTD.
33 North Dearborn Street
Suite 930
Chicago, Illinois 60602
(312) 263-0345
Counsel for Petitioner

Pandick Midwest, Inc., Chicago • 454-7600

55pp

QUESTION PRESENTED

Whether the decision below contravenes an opinion of this Court and prior opinions of the Seventh Circuit Court of Appeals, as well as the Sixth Amendment right to assistance of counsel, by failing, as required by case law, to analyze some ineffective assistance of counsel claims at all and by analyzing other ineffectiveness claims by standards that negate Seventh Circuit precedent.

PARTIES TO THE PROCEEDING BELOW

Petitioner Gordon M. Kenngott and co-defendant Ivan Brown as well as the United States of America were the parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	i
TABLE OF CITATIONS	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASON FOR GRANTING THE WRIT	5
The Decision Below Contravenes An Opinion Of This Court And Prior Opinions Of The Seventh Circuit Court Of Appeals By Failing To Analyze Certain Ineffective Assistance Of Counsel Claims At All And By Analyzing Other Ineffectiveness Claims By Standards That Negate Seventh Circuit Precedent, Thus Rendering Illusory Rather Than Real The Sixth Amendment Right To Assistance Of Counsel	5
CONCLUSION	18
APPENDIX:	
Court of Appeals Opinion decided May 4, 1984	1a
Court of Appeals Order amending opinion dated May 4, 1984 and denying petition for rehearing and suggestion for rehearing *en banc* dated July 10, 1984	22a
Indictment in the case of *United States of America* v. *Gordon M. Kenngott and Ivan W. Brown,* Criminal No. 81-20035	24a

TABLE OF CITATIONS

	PAGE
Strickland v. *Washington*, ____ U.S. ____ (1984).	5, 9, 12
United States v. *Berardi*, 675 F.2d 894 (7th Cir. 1982)	8
United States v. *Conroy*, 589 F.2d 1258 (5th Cir. 1979)	15
United States v. *Cullen*, 454 F.2d 386 (7th Cir. 1971)	15
United States v. *Fearns*, 501 F.2d 486 (7th Cir. 1974)	13
United States v. *Fulcher*, 626 F.2d 985 (D.C. Cir. 1980)	12
United States v. *Raineri*, 670 F.2d 702, 712 (7th Cir. 1982)	7
United States v. *Robinson*, 651 F.2d 1188 (6th Cir. 1981)	9
United States v. *Starks*, 515 F.2d 113 (3d Cir. 1975), rev'd. in part on other grounds *sub nom. Abney* v. *United States*, 431 U.S. 651 (1977)	8
United States v. *Tanner*, 417 F.2d 128 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972)	9
United States v. *Weidman*, 572 F.2d 1199 (7th Cir. 1978)	13
United States v. *Weston*, 708 F.2d 302 (7th Cir. 1983)	6
United States ex rel. Williams v. *Twomey*, 510 F.2d 634 (7th Cir.), *cert. denied*, 412 U.S. 876 (1975)	7, 8

STATUTES AND RULES

Title 28 United States Code § 1254(1)	2
Federal Rules of Evidence 403	14
Federal Rules of Evidence 404(b)	13, 14
Federal Rules of Criminal Procedure 7(c)	8, 11

PAGE

OTHER PROVISIONS

Amendment VI United States Constitution 2, 8, 11, 14

8 J. Moore *Federal Practice*, ¶ 804[1] at 8-12, 13 (2d ed. 1983) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GORDON M. KENNGOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Gordon M. Kenngott, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 4, 1984 and amended on July 10, 1984.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit, not yet reported, appears in the Appendix to this brief. (App. 1a-21a). Also included in the Appendix is an order of the Court of Appeals for the Seventh Circuit denying petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* and amending its published panel opinion. (App. 22a-23a).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 4, 1984. A timely Petition For Rehearing And Suggestion For Rehearing *En Banc* was denied on July 10, 1984, and this Petition for Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment to the Constitution of the United States of America, VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner Gordon M. Kenngott, together with a co-defendant, Ivan W. Brown, was named on November 4, 1981 in a five-count indictment. Count One charged the defendants with conspiracy to commit certain substantive offenses against the United States (18 U.S.C. §§ 1341, 1343 and 2314) in violation of 18 U.S.C. § 371 by engaging in an allegedly fraudulent loan brokerage practice in which clients were induced by false representations to pay funds for securing loan commitments. Counts Two and Four charged the defendants with wire fraud in violation of 18 U.S.C. § 1343; Counts Three

and Five charged them with violations of 18 U.S.C. § 2314. (R. 1). (App. 30a-31a).[1] The case was tried before a jury which returned verdicts of guilty on all counts against both defendants on February 9, 1982. (R. 22, 23). The district court denied petitioner Kenngott's post-trial motion on February 23, 1982. (R. 25). On March 25, 1982, petitioner was sentenced to four years incarceration and fined $10,000 on Count One; he was also sentenced to three years incarceration and fined $2,500 on each of the four remaining Counts with execution of sentence as to imprisonment suspended and probation imposed. (R. 27). Kenngott filed a notice of appeal on March 29, 1982. (R. 28). On August 30, 1982, a brief on appeal to the Seventh Circuit was filed on behalf of petitioner Kenngott by his trial counsel, which the government moved to dismiss on January 20, 1983. By order dated February 23, 1983, the Court of Appeals for the Seventh Circuit denied the government's motion to dismiss, but granted petitioner Kenngott's motion for leave to file a supplemental brief by an attorney other than his trial counsel. That supplemental brief was filed on April 4, 1984 and the Court of Appeals for the Seventh Circuit affirmed the conviction on May 4, 1984. On July 10, 1984, Kenngott's petition for rehearing was denied.

Petitioner Kenngott and co-defendant Ivan M. Brown were financial advisors and consultants in Milwaukee, Wisconsin. Around 1971, petitioner Kenngott formed his own company to provide services which included analyzing and developing merger acquisitions, as well as assisting clients in obtaining funds to finance their various projects. Brown, whom petitioner met in 1979, was engaged in a similar loan brokerage business. Kenngott and Ivan Brown were convicted of conspiracy, wire fraud and transporting funds in interstate commerce knowing

[1] Because the indictment is necessary to an understanding of the arguments presented below, it is included in this brief at Appendix 24a-31a.

them to have been taken by fraud in respective violation of 18 U.S.C. §§ 371, 1343 and 2314. The charges purportedly were based upon illegal activities in connection with the defendants' joint efforts to secure funding for two specific projects—the purchase of an apartment building in Hawaii and the construction of an oil refinery in the Virgin Islands. In essence, Kenngott and Brown were alleged to have unlawfully induced clients with respect to these projects to pay advance fees for the purchase of a non-existent "I.C.C. 290 bond" by means of false representations that such bonds were necessary to process their loans. Petitioner Kenngott's defense at trial was that he acted in good faith, based upon his understanding that the term "I.C.C. 290" was merely an abbreviated reference to procedures established by the International Chamber of Commerce for the use of letters of credit which were published in a brochure under that number.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW CONTRAVENES AN OPINION OF THIS COURT AND PRIOR OPINIONS OF THE SEVENTH CIRCUIT COURT OF APPEALS BY FAILING TO ANALYZE CERTAIN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AT ALL AND BY ANALYZING OTHER INEFFECTIVENESS CLAIMS BY STANDARDS THAT NEGATE SEVENTH CIRCUIT PRECEDENT, THUS RENDERING ILLUSORY RATHER THAN REAL THE SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL

This Court, in *Strickland* v. *Washington*, ____ U.S. ____ (1984), established the standards by which to judge an assertion that a criminal judgment be overturned because of the actual ineffective assistance of counsel. The Court promulgated a test containing two essential components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable. Unless a defendant makes both showings it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

____ U.S. at ____.[2] Elaborating on the first component, the Court stated:

> [A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct

---

[2] The Court of Appeals for the Seventh Circuit also previously has employed a similar two-pronged inquiry into claims of ineffective

(Footnote continued on following page.)

> on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and make all significant decisions in the exercise of reasonable professional judgment.

Id. at ____.

In order to establish the second component, the Court held:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at ____. Finally, the Court asserted that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at ____. Of course, both the performance and prejudice components of an ineffectiveness of counsel inquiry involve mixed questions of law and fact. *Id.*

In considering petitioner's claims of ineffective assistance of trial counsel, the decision below applied neither the test stated in *Strickland* nor the Seventh Circuit's own similar test enunciated in such cases as *United States* v. *Weston,* 708 F.2d

---

(Footnote continued from preceding page.)

assistance of counsel. *E.g.,* United States v. Weston, 708 F.2d 302, 306 (7th Cir. 1983) (attorney performance and defense prejudice constitute review components of ineffective assistance of counsel claims).

302, 306 (7th Cir. 1983) (assessment of attorney performance and defense prejudice constitute review components of ineffective assistance of counsel claims); *United States* v. *Raineri,* 670 F.2d 702, 712 (7th Cir. 1982) (attorney adequacy measured by totality of circumstances on case-by-case basis and defendant must demonstrate prejudice from counsel's incompetence); *United States ex rel. Williams* v. *Twomey,* 510 F.2d 634, 640 (7th Cir.), *cert. denied,* 423 U.S. 876 (1975) (counsel performance must meet a "minimum professional standard"). Rather, the decision below in some instances failed to analyze petitioner's ineffectiveness claims at all and in other instances applied a standard of "grossly incompetent professional conduct." (App. 23a). The law of the Seventh Circuit, however, some years ago mandated a test of attorney performance that meets a "minimum professional standard."[3] As a result, the decision below has rendered illusory rather than meaningful and real the sixth amendment guarantee of assistance of counsel.

Thus, the decision below ignored petitioner's arguments with respect to trial counsel's failure to make any pretrial motions regarding the indictment[4] though petitioner had enumerated defects in the indictment and demonstrated resultant prejudice. Specifically, Count One of the indictment is duplicitous in that paragraph 7 of Count One charged that Kenngott and Brown engaged in a scheme to defraud for the purpose of obtaining money by means of false representations between January 1, 1979 and November 4, 1981, while paragraph 9 of Count One charged that between January 1, 1979 and November 4, 1981, Kenngott and Brown conspired to commit violations of 18 U.S.C. §§ 2314, 1343 and 1341. Those particular offenses, alleged in subparagraphs A, B and C to paragraph 9 (the conspiracy paragraph) of Count One are undecipherable

[3] United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), *cert. denied,* 423 U.S. 876 (1975).

[4] Trial counsel filed no substantive pretrial motions.

because all are phrased in the language of a scheme to defraud. (R. 1). (App. 26a). In short, Count One of the indictment charged two distinct offenses—conspiracy and a scheme to defraud.

A duplicitous indictment is one which charges in a single count two or more distinct offenses.[5] The dangers posed by a duplicitous indictment include:

> The possibility that the defendant may not be adequately notified of the charges against him, that he may be subjected to double jeopardy, that he may be prejudiced by evidentiary rulings at trial, and that he may be convicted by a less than unanimous verdict.[6]

Certain of those dangers were present in this case. First, Count One of the indictment, charging as it did two distinct offenses, together with its total incomprehensibility, failed to accord the defendant his right under the sixth amendment and Fed.R.Crim.P. 7(c) to notice of the "nature and cause of the accusation" against him. Second, since there is no clear identification of the crime charged, petitioner Kenngott is not protected against double jeopardy.[7] Despite these dangers, petitioner's trial counsel made no pretrial motions to: (1) dismiss the indictment on grounds of duplicity; (2) compel the government to elect the offense on which it wished to proceed; or (3) obtain a bill of particulars. The failure to make any of

---

[5] *E.g.,* United States v. Starks, 515 F.2d 112, 116 (3d Cir. 1975), *rev'd. in part on other grounds sub nom.* Abney v. United States, 431 U.S. 651 (1977).

[6] United States v. Berardi, 675 F.2d 894, 899 (7th Cir. 1982).

[7] *E.g.,* United States v. Tanner, 471 F.2d 128, 139 (7th Cir.), *cert. denied,* 409 U.S. 949 (1972) (protection against double jeopardy is compelling consideration in duplicity issue).

these motions, particularly a motion to compel election,[8] either pretrial or even during the trial, did not amount to "reasonable professional judgment"[9] under any fair, objective assessment of attorney performance. Moreover, the failure to at least present a motion to compel election cannot be considered trial strategy. That petitioner was prejudiced by trial counsel's failure to act is demonstrated by the facts that (1) the failure to make any timely motions with regard to the duplicitous count waived the issue;[10] and (2) petitioner is left subject to double jeopardy.[11] Succinctly, both components of the effectiveness inquiry—deficient attorney performance and sufficient prejudice—have been met.

Duplicity, however, was not the only problem with the indictment which should have been raised pretrial or, at a minimum, prior to the jury charge. Count Two of the indictment, without incorporating any of the allegations of Count One, alleged that between December 14, 1979 and May 31, 1980, Kenngott and Brown having "devised . . . the aforesaid scheme" caused money to be transferred by wire from Champaign County, Illinois to Milwaukee, Wisconsin in violation of 18 U.S.C. § 1343. (R. 1). (App. 30a). The first problem with Count Two is that, though it asserted that the defendants devised the "aforesaid scheme," not only was there a failure to incorporate by reference the scheme allegations of paragraph 7 of Count One, but the dates of the alleged scheme in Count Two—December 14, 1979 to May 31, 1980—are different from those alleged in the scheme aspect of Count One—January 1, 1979 to November 4, 1981. Accordingly, the

---

[8] *E.g.,* United States v. Robinson, 651 F.2d 1188, 1194 (6th Cir. 1981) (motion to compel election proper remedy for duplicity in indictment).

[9] Strickland v. Washington, ____ U.S. ____ (1984).

[10] 8 J. Moore, *Federal Practice,* ¶ 804[1]. at 8-12, 13 (2d ed. 1983).

[11] *E.g.,* United States v. Tanner, 471 F.2d 128, 139 (7th Cir.), *cert. denied,* 409 U.S. 949 (1972).

scheme alleged in Count Two must be different from that alleged in Count One. Even more significantly, the district judge charged the jury with respect to Count Two in pertinent part as follows:

> Under Count II of the Indictment the Government has the burden of proving beyond a reasonable doubt each of the following propositions:
>
> First, the defendant willfully and knowingly devised a scheme to defraud or for obtaining money by means of false pretenses, representations or promises as described in Count II of the indictment as I have outlined it for you in these instructions; and
>
> Second, the defendant transmitted or caused to be transmitted by means of wire in interstate commerce writings, signs, signals or sounds for the purpose of executing the scheme to defraud.

(R. 21). Thus, the court charged the jury with respect to the elements which must be proved with regard to Count Two, but, contrary to its instruction, it had never defined or outlined to the jury any scheme to defraud—not that alleged in Count One or any other scheme. Accordingly, the jury was provided with no instructional outline or even a single detail of any scheme to defraud, even though it had to find the existence of such a scheme in order to find the petitioner guilty on Count Two. Despite these substantial problems, trial counsel for petitioner failed to object to the court's instruction, to seek any clarification either for the jury or himself, or to make any trial or pretrial motions regarding Count Two which sought particulars concerning the alleged schemes and the dates of the schemes and whether the scheme in Count Two was different from that alleged in Count One.

As with the duplicity issue, trial counsel's failure to act on behalf of his client with regard to Count Two of the indictment was outside the range of professionally competent judgment

and cannot be deemed sound trial strategy. Not only is there no conceivable strategical advantage to counsel's failure to act, but to the contrary, counsel's omissions, from any reasonable viewpoint, could only be deemed totally detrimental to his client. By counsel's performance deficiencies, petitioner Kenngott was prejudiced by having the jury instructed that it must find as an essential element of Count Two a scheme to defraud which had never been described or outlined for it.[12]

With regard to both Counts Two and Four, the allegations contained therein were insufficient as a matter of law. First, neither count sets forth either the nature of the scheme to defraud or describes a single false pretense, representation or promise. Accordingly, the counts did not meet the requirements of either the sixth amendment or Fed.R.Crim.P. 7(c). Moreover, the reference in Count Two to the "aforesaid scheme" was not sufficient to incorporate by reference the scheme allegations of Count One. The opinion below, however, essentially ignoring all of Kenngott's arguments regarding trial counsel's deficient performance with regard to the indictment, simply stated:

> Kenngott more specifically complains that his counsel should have made pretrial motions with respect to deficiencies in the indictment, alleging that inconsistent dates in the indictment made it confusing and defective, and that the face of the indictment revealed improper venue. We do not agree. The dates within the indictment differ because they relate to different counts charged and different overt acts Kenngott and Brown allegedly committed in furtherance of their conspiracy . . . .

(App. 15a). One count of an indictment, however, cannot look to another for dates or overt acts. Each count must stand on its

---

[12] Everything stated with regard to Count Two is equally applicable to Count Four in that the same defects exist: (1) with respect to the indictment; (2) with regard to the court's charge to the jury; and (3) with respect to incompetent attorney performance and resultant prejudice to the defense.

own. As stated in *United States* v. *Fulcher,* 626 F.2d 985, 988 (D.C. Cir.), *cert. denied,* 449 U.S. 839 (1980), reversing a trial court's failure to strike certain false pretense counts which did not set forth the underlying false representations:

> The allegations of the first [mail fraud] count are not "necessarily incorporated" in the others. Each count in an indictment is regarded as if it was a separate indictment .... Each count must stand on its own, and cannot depend for its validity on the allegations of any other count not specifically incorporated .... The false pretenses counts cannot absorb by osmosis the allegations of the mail fraud count.

(Citations omitted). Similarly here, the wire fraud counts could not absorb by osmosis the allegations of Count One.

Contrary to the mandate of this Court in *Strickland* and to the Seventh Circuit's own case law, the decision below failed to analyze counsel's performance and the prejudice engendered by his deficiencies. With the exception of its conclusions regarding the "confusing" dates in the indictment (App. 15a), the remainder of the opinion below is silent with regard to petitioner's allegations of counsel's deficient performance concerning the indictment and the resultant prejudice. Because the case law of the Seventh Circuit Court of Appeals as well as the mandate of this Court require that attorney performance and claims of prejudice resulting from attorney incompetence at least be given some analysis, the failure of the court below to undertake any analysis whatsoever of petitioner's claims of attorney incompetence and resultant prejudice in connection with plain indictment defects was error.

Another instance of palpable attorney incompetence was the failure of petitioner's counsel to object to or otherwise seek to limit the government's introduction of irrelevant and prejudicial "other act" evidence, apparently admitted pursuant to

Fed.R.Evid. 406(b).[13] The "other act" evidence at issue, presented through two bank officers, was completely irrelevant to the charges of the indictment and was devastating to petitioner in that it suggested, through opinions and speculations of the witnesses which had no factual basis, that petitioner's entire career in business had been a sham.[14] Had trial counsel moved to exclude the evidence on the basis that it was irrelevant to any issue except the defendant's character[15] and that its probative value was substantially outweighed by its unfairly prejudicial impact,[16] the district court would have granted the motion. The court would have granted the motion because, under Fed.R.Evid. 404(b), the evidence, particularly that elicited from the bank officers, was not relevant to any identified issue at trial except to prove that petitioner was a person of bad character.[17] Accordingly, had the issue been properly raised, the district court would have excluded the evidence not only because it was irrelevant under Fed.R.Evid.

---

[13] In fact, there is no indication from the record under what evidentiary theory the evidence was admitted. The government never identified the issue, such as intent, knowledge, motive, etc., on which it sought to admit the evidence. Of course, trial counsel never sought such an identification as competent counsel would have.

[14] Also irrelevant and highly prejudicial was testimony by unindicted co-conspirator Synan concerning unrelated transactions he had with Kenngott.

[15] *See* n. 13 *supra*.

[16] *E.g.*, United States v. Fearns, 501 F.2d 486, 490-91 (7th Cir. 1974) (two-step analysis as prerequisite to admissibility of other act evidence.

[17] Other act evidence cannot be used to show that the accused was a person of bad character and thus predisposed to commit the charged offense. *E.g.*, United States v. Weidman, 572 F.2d 1199, 1201 (7th Cir. 1978).

404(b), but also because under Fed.R.Evid. 403, its prejudicial impact outweighed its probative value.[18]

In accordance with the standards enunciated in the Seventh Circuit opinions, and in *Strickland* and this Court's ineffective assistance of counsel cases preceding *Strickland,* trial counsel's representation with regard to the "other act" evidence fell below any fair, objective standard of reasonableness or competence. Counsel's inaction cannot be deemed a trial tactic

---

[18] With regard to the claim of counsel incompetence concerning the issue of "other act" evidence, the decision below stated:

> Kenngott complains that his counsel failed to object to the admission of prejudicial "other act" evidence. Kenngott admits that "[p]erhaps such evidence was admissible under Fed.R.Evid. 404(b)," but claims that counsel's failure to require a determination of admissibility or a balancing of the evidence's relevance against its prejudicial impact was "unconscionable." Kenngott's concession that the evidence complained of may have been admissible is fatal to his claim. As noted above, a defendant claiming ineffective assistance of counsel must prove that his attorney's acts or omissions somehow harmed his case. A complaint about the failure to object to the admission of evidence does not begin to make out a colorable claim of ineffective assistance if the complaint fails to allege that the evidence should ultimately have been excluded. There can be no prejudice if the evidence is admissible. Moreover, the failure to object to evidence that though prejudicial, is probably admissible, clearly qualifies as falling within the realm of tactics. Objecting to those two short bits of testimony about Kenngott may have highlighted the "other acts" referred to and caused more harm than quietly letting the testimony slip by.

(App. 15a-16a). Contrary to the statement in the opinion, at no time on appeal did petitioner concede or admit that the "other act" evidence was admissible. Rather, he had argued that it was not. The opinion below simply took out of context petitioner's forthright recognition of the trial court's discretion with regard to the admissibility of Rule 404(b) evidence. Due to trial counsel's failure to object or even to ask what on issue the evidence was being admitted, the trial court, of course, never had the need or opportunity to exercise its discretion.

in light of the devastating effect that the evidence—that all petitioner's business career was a sham—had on petitioner's sole defense of good faith.[19] The prejudice from counsel's deficient performance in this regard is palpable in that the irrelevant evidence destroyed his good faith defense. But for counsel's inaction, there is a "reasonable probability" that the evidence would not have been admitted and that the trial result would have been different.

Trial counsel's conduct also fell below a minimum standard of competence and reasonableness with respect to the issue of jury instructions. First, counsel failed to submit a single proposed instruction, not even a "good faith" theory of defense instruction although the sole defense presented was that petitioner Kenngott acted in good faith and absent any specific intent to violate the law.[20]

Compounding the problem of the court's refusal to give a theory of defense instruction and trial counsel's failure to object to the court's refusal was the failure of counsel for petitioner to object to an erroneous instruction given by the court defining

---

[19] Contrary to the statement in the decision below that the failure to object fell within the range of tactics because an objection "may have highlighted the 'other acts' referred to" and thus caused more harm than good (App. 16a), competent criminal counsel would have made either an *in limine* motion to obtain a pretrial ruling with regard to other act evidence or, failing that, would have stated his objections as to the evidence out of the jury's presence.

[20] Co-defendant Brown proffered a good faith instruction which the trial court declined to give. (R. 20). (Transcript of Jury Instruction Conf. at 16-17). Trial counsel for petitioner even failed to object to the court's refusal to give co-defendant Brown's good faith instruction. Accordingly, with no objection by counsel for petitioner, the jury was never instructed as to any theory of defense, even though a defendant in a criminal prosecution is entitled to have the court instruct the jury on the defense "theory of the case" where, as here, that theory has foundation in the evidence and is supported by law. *E.g.*, United States v. Conroy, 589 F.2d 1258, 1273 (5th Cir. 1979); United States v. Cullen, 454 F.2d 386, 390 (7th Cir. 1971).

the term "knowingly." The trial court declined to instruct the jury on "specific intent," but gave an "intent to defraud" instruction. That instruction stated:

> To act with intent to defraud means to act knowingly and with specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

(R. 21). The court, however, with no objection by petitioner's counsel, then erroneously defined the term "knowingly" as follows:

> When the word 'knowingly' is used in these instructions, it means that a defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. *To act knowingly does not mean that a defendant had to realize he was violating the law.*

(R. 21). The italicized portion of this instruction is plain error and finds no support in the law. In essence, the court negated the requisite specific intent[21] and allowed the jury to convict petitioner even if he neither knew nor intended his conduct to be unlawful. Trial counsel for petitioner at no time objected to this plainly erroneous instruction.

Except for stating that "the failure to submit instructions does not itself make out a claim of ineffective assistance" (App. 17a), the decision below is silent with regard to petitioner's arguments regarding trial counsel's failures with regard to jury instructions. By any standard, trial counsel's performance with regard to jury instructions was not reasonable. His incompetent performance prejudiced petitioner in that the jury was never instructed with regard to the only defense advanced at trial and, making that matter worse, the jury was never instructed

---

[21] The crimes charged in the indictment were specific intent crimes.

regarding specific intent but rather was instructed in a manner that negated the necessity for a finding of specific intent. Had counsel's performance in this regard not been so deficient, there is a reasonable probability that the outcome of the trial would have been different.

The decision below is erroneous for failing to analyze and for applying incorrect standards to, in accordance with this Court's mandate and with opinions of the Seventh Circuit Court of Appeals, petitioner's ineffective assistance of counsel claims.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Seventh Circuit affirming the conviction of petitioner.

Respectfully submitted,

GEORGE J. COTSIRILOS
ANN C. TIGHE
COTSIRILOS & CROWLEY, LTD.
33 North Dearborn Street
Suite 930
Chicago, Illinois 60602
(312) 263-0345
Counsel for Petitioner

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 82-1581 and 82-1582

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

IVAN W. BROWN and GORDON M. KENNGOTT,

Defendants-Appellants.

Appeal from the United States District Court for the Central District of Illinois, Danville Division.
No. 81 20035—Harold A. Baker, *Judge.*

ARGUED DECEMBER 6, 1983—DECIDED MAY 4, 1984

Before CUMMINGS, *Chief Judge,* and PELL and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* This case is about four people (the two defendants along with two unindicted co-conspirators) who allegedly engaged in a fraudulent loan brokerage business wherein they induced investors into advancing funds for the purchase of so-called "ICC-290 letters of credit," which were not the investments they were represented to be. A jury found both defendants guilty of conspiracy, wire fraud, and interstate transportation of stolen property in violation of 18 U.S.C. §§ 371, 1343, and 2314. The defendants, Ivan W. Brown and Gordon M. Kenngott,

separately raise a number of issues on appeal, some of them overlapping. We affirm their convictions.[1]

I. *Background*

Around 1971, defendant Kenngott formed a business called Kenngott Financial, Ltd., located in Wisconsin. Kenngott was the corporation's sole employee; he assisted companies in merger acquisitions and in obtaining funds. Kenngott met defendant Brown, also from Wisconsin, in June 1979. Brown operated a similar business known as International Barters. The defendants then began working together in arranging loan packages for client projects. Kenngott would supposedly arrange for the source of the funds, and Brown would arrange for the collateral. Kenngott and Brown then became acquainted with and began doing business with Don Johnson and Joseph Synan, two unindicted co-conspirators who were also engaged in the loan brokerage business: Johnson worked under the name Donald G. Johnson & Associates in Kansas, and Synan operated a number of loan brokerage companies, with "finders" located all over the country, including Illinois. Johnson and Synan referred loan packages from their clients to Kenngott and Brown, and had their clients wire money to Kenngott and Brown to purchase ICC-290 letters of credit, which would allegedly guarantee their loans and make them easier to fund. The catch, as the unwitting victims who wired various amounts ranging from $10,000 to $190,000 soon found out, was that there is no such thing as an ICC-290 letter of credit. The ICC-290 is simply a pamphlet published by and readily available from the International Chamber of Commerce to facilitate international trade by establishing certain

[1] The district judge sentenced both Brown and Kenngott to four years imprisonment and a $10,000 fine on Count I, the conspiracy count; and to three years imprisonment and a $2,500 fine on each of Counts II through V, with imprisonment suspended and probation imposed.

standard rules and terminology. After hearing a much more detailed version of the scheme, the jury found both Brown and Kenngott guilty of running a fraudulent loan brokerage business.

Brown and Kenngott now complain: (1) that the district judge erred at the *Santiago* Rule 104 hearing when he concluded that there was sufficient evidence of a conspiracy to allow the government to introduce statements at trial of alleged co-conspirators Don Johnson and Joseph Synan; (2) that the district judge erred in refusing to give certain jury instructions tendered by the defendants, and that the instructions finally read to the jury failed to adequately state the law; and (3) that the evidence against the defendants was insufficient to support the verdict. In addition, Kenngott alleges that he was deprived of his constitutional right to effective assistance of counsel at trial, and that the district court lacked jurisdiction because of improper venue, and Brown contends that the prosecutor committed prejudicial error in his final argument.

II. *Admissibility of Alleged Co-Conspirator Statements*

Prior to trial the court held a hearing to determine whether certain co-conspirator statements would be admissible against the defendants at trial. *See United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978); Fed. R. Evid. 104. Kenngott and Brown dispute the court's finding that the government proved by a preponderance of the evidence that the defendants participated in a conspiracy, and argue that co-conspirator statements were therefore wrongfully admitted. Although the district court did not outline the evidence upon which it based its finding, there is sufficient, although not overwhelming, circumstantial evidence in the record of the *Santiago* hearing to support the district court's conclusion that it was more likely than not that the two defendants participated along with the two unindicted co-conspirators in a conspiracy to defraud. Direct evidence is not necessary. *Glasser v.*

United States, 315 U.S. 60, 80 (1942); *United States v. Dalzotto*, 603 F.2d 642, 645 (7th Cir.), *cert. denied*, 444 U.S. 994 (1979).

A. Kenngott focuses his argument around his own asserted innocence, arguing that the unindicted co-conspirator statements were wrongfully admitted against the defendants because the government allegedly failed to present evidence that the defendants themselves were guilty of misrepresentation. After reviewing the record, we find ample evidence of the defendants' active and knowing participation in a conspiracy to defraud.

Don Johnson testified that he began referring clients' loan packages to Brown and Kenngott in the spring of 1979, and that at that time he had conversations with both defendants regarding the "procedures" they used in their loan brokerage business. As Kenngott described his business to Johnson, Kenngott would find actual lenders of funds, and Brown would arrange for necessary collateral. Johnson then had a conversation with Brown, who told Johnson that he used ICC-290 letters of credit to arrange collateral for funding, and that when a client wished to purchase an ICC-290, the money, along with a fee set by Brown, should be sent to Brown.

Joseph Synan testified that he too was engaged in the loan brokerage business, and that he became acquainted with Kenngott and Brown through Don Johnson. Synan described some specific loan packages that he submitted in 1979 to Kenngott and Brown through Johnson. Synan testified that Johnson, Kenngott, and Brown each advised him that ICC-290 guarantees were necessary to obtain funding for the loan packages. Although the money for the ICC-290s was forwarded to Kenngott and Brown, none of the loans came through. Synan requested on the first occasion that the money be returned, but Kenngott and Brown told him that was impossible because the money had already been used to secure the ICC-290s.

Synan subsequently submitted another loan request to Kenngott and Brown through Johnson for a project re-

ferred to as Virco. Synan and Johnson both testified in great detail about the Virco project, one of the specific loan packages that led to the indictment against Kenngott and Brown.

In the fall of 1979 Johnson had a telephone conversation with Brown regarding the amount necessary to purchase an ICC-290 for the Virco loan. Brown told him $190,000 would be required. Johnson also had a telephone conversation with Kenngott regarding funding for the Virco loan. Kenngott told him the funders were ready to go as soon as the collateral was in place, and that the lender would be a person from the Middle East. Johnson relayed this information to Synan and referred the Virco package to Kenngott.

Synan testified that he also spoke directly with Kenngott and Brown about the Virco loan. Kenngott told Synan that the loan was a good one, but that it needed an ICC-290 guarantee before it could be processed and funded. Brown told Synan that $190,000 had to be submitted to secure the ICC-290 guarantee. Synan then had two clients send Brown and Kenngott the $190,000. As before, the loan was not forthcoming. Also as before, Kenngott told Synan that it was not possible to get a refund because the money had already been used to secure the ICC-290.

Thierry Verhaegen, an attorney with the United States branch of the International Chamber of Commerce, explained what an ICC-290 really is. He testified that it is a set of guidelines designed to help businessmen export goods overseas by using letters of credit. It is not itself a letter of credit that can be purchased by individuals seeking loans. No portion of the document covers the loaning of money or money-changing.

The evidence at the *Santiago* hearing established that Kenngott and Brown completely misrepresented and mischaracterized the nature of an ICC-290, and through their misrepresentations induced unwitting investors found by Johnson and Synan to send money to Kenngott and

Brown for the so-called ICC-290. None of the investors ever saw their money again, and the loans that the ICC-290s were to provide collateral for never came through. The natural and allowable inference from the testimony and evidence presented is not, as defendants assert, that Kenngott and Brown simply and innocently used terminology in a way not originally intended by the International Chamber of Commerce, but that Kenngott and Brown misrepresented the nature of an ICC-290 as part of their conspiracy to defraud investors. The evidence at the *Santiago* hearing was circumstantial, as it often is, but it was sufficient to prove that it was more likely than not that Kenngott and Brown created and actively participated in this unique conspiracy to defraud. *Cf. United States v. Kaminski*, 692 F.2d 505, 512 (8th Cir. 1982); *United States v. Kreimer*, 609 F.2d 126, 132 (5th Cir. 1980); *United States v. Talbott*, 590 F.2d 192, 194 (6th Cir. 1978); *United States v. Becker*, 569 F.2d 951, 959-60 (5th Cir.), *cert. denied*, 439 U.S. 865 (1978).

B. Additionally, however, Brown contends that Synan's and Johnson's statements should not have been admitted because Synan and Johnson do not qualify as co-conspirators with the defendants. Brown argues that there was no evidence of a continuity of interest between Synan and the defendants, and that Johnson was no more than an unknowing conduit between Synan and the defendants.

It is well settled that a written or spoken agreement among alleged co-conspirators is unnecessary; rather, indirect evidence of "[a] mere tacit understanding will suffice." W. LaFave and A. Scott, Jr., *Handbook on Criminal Law* § 61, at 461 (1972) (footnote omitted); *e.g., Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1974); *United States v. Hedman*, 630 F.2d 1184, 1192 (7th Cir. 1980); *United States v. Consolidated Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978); *United States v. Robinson*, 470 F.2d 121, 123 (7th Cir. 1972). Brown admits that Johnson and Synan had a working relationship with each other, and our search of the record reveals sufficient evidence

to link Johnson and Synan as co-conspirators with Brown and Kenngott.

Johnson testified that Brown offered him a commission of $5,000 to $10,000 for each client he brought in who purchased an ICC-290. Johnson also testified that he forwarded approximately five to six loan packages to Brown and Kenngott, but that he never heard of any loan package that the defendants ever funded. Synan, who is currently serving time in prison for another felony conviction, forwarded approximately four loan packages to the defendants through Johnson, but admitted on cross-examination that he never heard of an ICC-290 loan package getting funded, that he did not believe the loans would ever be funded, and that he admitted to the FBI that he knew the whole loan brokerage business was a fraud and a sham. Just as the evidence is sufficient to prove that it was more likely than not that Brown and Kenngott joined together in a conspiracy to defraud, the evidence is also sufficient to implicate Johnson and Synan as knowing participants in that conspiracy.

Thus, it was sufficiently shown that the defendants as well as the unindicted co-conspirators joined their various nefarious talents together for the good of their common fraudulent scheme in the expectation of benefiting from it personally. Any other view of the evidence would be naive and unrealistic. All four co-conspirators engaged in some aspect of the loan business; they were not uninformed about what they were doing. To one in the business the ICC-290 must have been recognized as the gimmick it was, successful for the perpetrators of the conspiracy, but not for the investors. Every time an investor sent money to purchase the so-called ICC-290 to serve as collateral for a loan, the loan never materialized, and the ICC-290 money had the unfortunate characteristic of evaporating. Johnson's and Synan's statements are properly admissible under Fed. R. Evid. 801(d)(2)(E). The defendants are now and deserve to be losers along with the victims who contributed the money. We cannot say

the findings of fact of the experienced trial judge in this regard were erroneous.[2]

III. *Jury Instructions*

Brown and Kenngott also both take issue with the district court's refusal to tender the defendants' instructions on good faith and specific intent, and with the way the judge defined "knowingly."

Rule 30 of the Federal Rules of Criminal Procedure states:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

The record does not reveal that either defendant at any time during the trial voiced the objections he now raises before this court.[3] At the jury instruction conference, the attorneys for both defendants specifically approved the judge's instruction on the definition of "knowingly." And although the defendants submitted proposed instructions on good faith and specific intent, when the judge refused them as being adequately covered in the court's own proposed instructions, the defendants said nothing. Merely submitting instructions is not sufficient to preserve the right to appeal. A defendant must object to the judge's refusal to tender the defendant's instructions, and must clearly state the reasons for his objection. *United States v. Jackson*, 569 F.2d 1003, 1009-10 (7th Cir.), *cert. denied*,

---

[2] Since we find sufficient evidence to support the trial judge's Rule 104 findings, we need not consider the government's alternative argument that all of the testimony defendants object to is admissible on grounds other than as Fed. R. Evid. 801(d)(2)(E) declarations of co-conspirators.

[3] Although the government failed to recognize this problem, after a careful examination of the record, we take note of it on our own.

437 U.S. 907 (1978). Since the defendants failed to do so, we will not reverse unless the errors now alleged amount to prejudicial plain error. Fed. R. Crim. P. 52(b). We conclude that they do not.

Kenngott first contends that the refusal to give the defendants' good faith instruction deprived the defendants of an instruction on the defense theory of the case. The defendants did not, however, identify the instruction as a theory of the defense instruction when they proffered it. Moreover, as the court noted, the so-called good faith instruction did no more than give the defendants' definition of intent to defraud, a concept the court had already adequately defined.[4] There clearly was no plain error.

---

[4] The defendants requested the following instruction:

> Fraudulent intent is one of the essential elements of the offenses with which the defendants are charged. Fraudulent intent is not presumed or assumed; it is personal and not imputed. One is chargeable with his own personal intent, not the intent of some other person. Bad faith is an essential element of fraudulent intent. Good faith constitutes a complete defense to one charged with an offense of which fraudulent intent is an essential element. One who acts with honest intention is not chargeable with fraudulent intent. One who expresses an opinion honestly held by him or a belief honestly entertained by him, is not chargeable with fraudulent intent even though such opinion is erroneous and such belief is a mistaken belief. Evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent. In order to establish fraudulent intent on the part of a person, it must be established that such person knowingly and intentionally attempted to deceive another. One who knowingly and intentionally deceives another is chargeable with fraudulent intent notwithstanding the manner and form in which the deception was attempted.

This instruction was approved in *United States v. Ammons*, 464 F.2d 414, 417 (8th Cir.), *cert. denied*, 409 U.S. 988 (1972).

The trial court's instruction stated: "To act with 'intent to defraud' means to act knowingly and with specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to oneself."

Kenngott also complains that the court should have instructed the jury on specific intent. As Kenngott admits, however, the distinction between specific and general intent tends to confuse juries. Because of this, failure to give a separate instruction on specific intent is not reversible error so long as the court's general instructions on intent sufficiently define the appropriate mental state. *See* Committee on Federal Criminal Jury Instructions of the Seventh Circuit, *Federal Criminal Jury Instructions* § 6.02, at 94 (1980); *see also United States v. Arambasich*, 597 F.2d 609, 611 (7th Cir. 1979). Kenngott's reliance on *United States v. Barclay*, 560 F.2d 812 (7th Cir. 1977), where we accepted a defendant's complaint that the trial court's failure to instruct on specific intent to defraud required reversal, is misplaced. In *Barclay*, we specifically acknowledged the confusion created by distinguishing between general and specific intent, but reversed and remanded the case because the district court failed to instruct on either specific intent *or* intent to defraud. *Id.* at 818. Judge Baker did not make that mistake here. His instructions on "intent to defraud," "knowingly," and "willfully" adequately accomplished what defendants sought through their proffered instructions on fraudulent intent and specific intent—the judge's charge instructed the jury that defendants must have acted knowingly and with the specific intent to deceive. *See supra* note 4.

Defendants complain, however, that the last sentence of the court's definition of "knowingly" negated the requisite specific intent and allowed the jury to convict the defendants even if they did not intend to break the law. Again, we do not see any plain error. Although the court's definition of "knowingly" told the jury that someone may act knowingly without intending to violate a law,[5] we

[5] The court defined "knowingly" as follows: "When the word 'knowingly' is used in these instructions, it means that a defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. To act knowingly does not mean that a defendant had to realize he was violating the law."

must not read the definition in isolation. *See United States v. Lang*, 644 F.2d 1232, 1240 (7th Cir.) (as amended), *cert. denied*, 454 U.S. 870 (1981) ("The question of whether a jury has been properly instructed is to be determined not upon consideration of one single paragraph, sentence, phrase or word, but upon the charge as a whole." (citation omitted)). The court's instructions read as a whole clearly informed the jury that they were not to convict Brown and Kenngott for merely acting "knowingly."[6]

Finally, Brown asserts that the relationship between Johnson and Synan constituted a separate conspiratorial arrangement that should have prompted the court to instruct the jury on the theory of multiple conspiracies. Neither Brown nor Kenngott requested such an instruction, however, and we do not see any plain error in the court's failure to give one. Brown failed to explain how the alleged existence of separate conspiracies and the court's failure to give a more specific instruction on multiple conspiracies may have confused the jury, or allowed the jury to find Brown and Kenngott guilty for acts in which they were not involved. Brown's unexplained assertion that the court's generalized definition of conspiracy could "easily lead to confusion on the jurors' part" is insufficient to prove prejudice. Without any specific showing of how Brown may have been prejudiced, we will not reverse. *See United States v. Lindsey*, 602 F.2d 785, 787 (7th Cir. 1979).

---

[6] For each of counts II-V, the court instructed the jury that they must find that Kenngott and Brown acted "knowingly and willfully," with willfully defined as follows: "The term 'willfully' used in these instructions means deliberately and intentionally as distinguished from careless or inadvertent. As applied to a defendant in the context of this case it means that a defendant must have known and specifically intended his representations or promises to be false and fraudulent when he made them"

For count I, the court told the jury that the defendant must have "knowingly and intentionally became a member of the conspiracy," with conspiracy defined as "a combination of two and more persons to accomplish an unlawful purpose."

IV. *Ineffective Assistance of Counsel*

Kenngott's most serious individual claim is that he was deprived of his constitutional right to "legal assistance which meets a minimum standard of professional representation." *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 641 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975). Since Kenngott did not obtain new counsel until post-trial motions were concluded and after his trial attorney filed for appeal, the district court never had the opportunity to pass on the claim of ineffective assistance. Thus, the first issue we must decide, although the parties themselves did not raise it, is whether we should address the merits.[7]

---

[7] We have in some instances refused to decide attorney incompetence claims initially raised on appeal. We have not, however, adopted a per se rule that it is never proper to entertain such claims. *See, e.g., United States v. Nero*, No. 83-2095, slip op. at 18 (7th Cir. Apr. 25, 1984) (refused to decide attorney incompetence claim because record not sufficiently developed); *United States v. Jarrett*, 705 F.2d 198, 209 (7th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3122 (Aug. 6, 1983) (No. 83-204) (refused to decide attorney incompetence claim where defendant initially raised the claim with the district court, but terminated that proceeding and then attempted to directly raise the issue on appeal); *United States v. Lang*, 644 F.2d 1232, 1240 (7th Cir.) (as amended), *cert. denied*, 454 U.S. 870 (1981) (refused to decide attorney incompetence claim where no clear evidence in the record); *United States v. Gray*, 611 F.2d 194, 197 & n.3 (7th Cir. 1979) (per curiam), *cert. denied*, 446 U.S. 911 (1980) (decided that two claims of attorney incompetence were frivolous, but refused to decide third claim because the factual basis in the record was insufficient).

Other circuits that have confronted the issue of when it may be proper to resolve attorney incompetence claims initially raised on appeal have resolved it in different ways. *See, e.g., United States v. Griffin*, 699 F.2d 1102, 1107-09 (11th Cir. 1983) (blanket refusal to consider any attorney incompetence claim initially raised on appeal); *United States v. Whitley*, 670 F.2d 617, 621 (5th Cir. 1982) (may consider claim only if the record is sufficiently developed); *United States v. Aulet*, 618 F.2d 182, 185-86 (2d Cir. 1980) (may consider claim where both parties ask for a resolution of the issue, the resolution is beyond doubt, and remand to the district court would be a waste of judicial resources); *United States v.*

(Footnote continued on following page)

Nos. 82-1581 & 82-1582

Appellate courts generally refuse to consider issues raised for the first time on appeal. *See, e.g., Hormel v. Helvering*, 312 U.S. 552, 556 (1940); *Sharp v. Ford Motor Credit Co.*, 615 F.2d 423, 424 n.1 (7th Cir. 1980); *United States v. Gray*, 611 F.2d 194, 197 (7th Cir. 1979). This is not, however, an inflexible rule, *see, e.g., Singleton v. Wulff*, 428 U.S. 106, 121 (1975) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."); *United States v. Ward*, 387 F.2d 843, 845 (7th Cir. 1967), and we see no reason to make it inflexible in the context of direct appeals of attorney incompetence claims. When both parties ask us to resolve an attorney incompetence issue, when both parties have briefed and argued its merits, when we have the entire trial record before us, and when the benefit of a district court hearing is minimal because proper resolution of the issue is clear, we may, in our discretion, take the opportunity to finally conclude the litigation. *See United States v. Aulet*, 618 F.2d 182, 185-86 (2d Cir. 1980); *see also Singleton v. Wulff*, 428 U.S. at 121 ("Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . ." (citation omitted)). In exercising our discretion to take such action "as may be just under the circumstances," 26 U.S.C. § 2106, we address the attorney incompetence claim on the merits in this case.[8]

---

[7] *continued*
Schreiber, 599 F.2d 634, 638 (3d Cir. 1979) (will refuse to consider claim unless the incompetence was so gross that the district court's failure to notice it sua sponte constituted plain error); *United States v. Kazni*, 576 F.2d 238, 242 (9th Cir. 1978) (same); *United States v. McCord*, 509 F.2d 334, 352 n.65 (D.C. Cir. 1974) (en banc), *cert. denied*, 421 U.S. 930 (1975) (will dismiss claim where the record on appeal conclusively shows that the defendant is not entitled to relief).

[8] We emphasize, however, that it is clearly preferable for the district court in which the case was tried to be the first to con-

(Footnote continued on following page)

In an ineffective assistance of counsel case, the defendant bears the burden of proving that his counsel's representation amounted to " 'grossly incompetent professional conduct,' " *United States v. Weston*, 708 F.2d 312, 316 (7th Cir. 1983) (quoting *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975)), and of showing that the acts or omissions complained of impaired his defense, *United States v. Raineri*, 670 F.2d 702, 712 (7th Cir.), *cert. denied*, 103 S. Ct. 446 (1982); *cf. United States ex rel. Cosey v. Wolff*, 727 F.2d 656, 658 (7th Cir. 1984). In the case at hand, Kenngott supports his claim by pointing to specific objections and motions that he says his trial counsel should have made. In examining the totality of the circumstances, *United States v. Phillips*, 640 F.2d 87, 92 (7th Cir.), *cert. denied*, 451 U.S. 991 (1981), and keeping in mind that we will not second-guess tactical or strategic decisions, *United States v. Weston*, 708 F.2d at 306, we do not think Kenngott has met his burden, nor do we think he could if given the further opportunity to pursue his claim before the district court.

---

[8] *continued*
sider a claim of attorney incompetence. *United States v. Lang*, 644 F.2d 1232, 1240 (7th Cir.), *cert. denied*, 454 U.S. 870 (1981). The district judge has personally observed the performance of trial counsel, and has the opportunity, if necessary, to call and interview witnesses in a hearing on the issue of incompetence. A district court thus is in a better position to come to a conclusion than is an appellate court, which is limited to analyzing a sterile trial transcript. Therefore, it is better for a defendant to assert his attorney incompetence argument through, for example, a motion to the district court to vacate its judgment, or a habeas corpus petition. We will not consider an incompetence claim not first presented to the district court if there exists any doubt about how the issue should be resolved, or if we believe that further factual findings or development of the record may shed any light on the issue. Furthermore, when a defendant obtains new counsel prior to the conclusion of post-trial motions and the initiation of appeal to this court, we will look more unfavorably on the failure of new counsel to initially raise an incompetence claim before the district court. That, however, is not the situation in this case.

The first error claimed is the failure of Kenngott's attorney to file pretrial motions. We do not believe, however, that any pretrial motions were necessary. The trial judge issued a comprehensive discovery order soon after the indictment was returned. The government had an open file policy. There is no showing that Kenngott's attorney had difficulty obtaining necessary documents, or that he failed to review them. To the contrary, the facts of this case were complicated, and a review of the trial transcript reveals that his counsel had mastered them.

Kenngott more specifically complains that his counsel should have made pretrial motions with respect to deficiencies in the indictment, alleging that inconsistent dates in the indictment made it confusing and defective, and that the face of the indictment revealed improper venue. We do not agree. The dates within the indictment differ because they relate to different counts charged and different overt acts Kenngott and Brown allegedly committed in furtherance of their conspiracy. Furthermore, as we discuss later, there was no problem with venue.

Second, Kenngott complains that his counsel failed to object to the admission of prejudicial "other act" evidence. Kenngott admits that "[p]erhaps such evidence was admissible under Fed. R. Evid. 404(b)," but claims that counsel's failure to require a determination of admissibility or a balancing of the evidence's relevance against its prejudicial impact was "unconscionable." Kenngott's concession that the evidence complained of may have been admissible is fatal to his claim. As noted above, a defendant claiming ineffective assistance of counsel must prove that his attorney's acts or omissions somehow harmed his case. A complaint about the failure to object to the admission of evidence does not begin to make out a colorable claim of ineffective assistance if the complaint fails to allege that the evidence should ultimately have been excluded. There can be no prejudice if the evidence is admissible. Moreover, the failure to object to evidence that though prejudicial, is probably admissible, clearly qualifies as falling within the realm of tactics. Objecting to

those two short bits of testimony about Kenngott may have highlighted the "other acts" referred to and caused more harm than quietly letting the testimony slip by. *See United States v. Fleming*, 594 F.2d 598, 607 (7th Cir.), *cert. denied*, 442 U.S. 931 (1979).

Third, Kenngott complains that his attorney allowed the prosecution to use tapes of two telephone conversations against Kenngott at trial without attempting to ensure that the government had complied with the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. The government claims that the disputed tapes were recordings of consensually monitored telephone calls and therefore were not subject to the Act. Regardless whether the tapes were subject to the Act, Kenngott's attorney's failure to investigate the circumstances surrounding the taping to determine if any valid objections could be raised did not in any way prejudice Kenngott's defense. The government never attempted to admit the tapes into evidence; the government merely used them—out of the presence of the jury—to refresh Kenngott's memory. It was Kenngott's counsel who, after hearing the tapes, decided to play them for the jury.[9] Kenngott does not dispute the propriety of his counsel's decision to play the tapes to the jury. He therefore cannot complain that it was incompetent for his counsel to fail to ensure that the government complied with the requirements of Title III.

Fourth, Kenngott alleges that his counsel lacked a sufficient understanding of conspiracy law and consequently failed to properly limit the introduction of certain co-conspirator statements. Again, Kenngott fails to meet his burden of proving that his counsel acted in a way that harmed Kenngott's defense. A general allegation that counsel should have limited the introduction of co-

[9] Kenngott's counsel even requested that the judge allow the jury to take the tapes with them into the jury room.

conspirator statements without identifying which statements were admitted that should not have been, is inadequate to support an allegation of attorney incompetence.

Finally, Kenngott points out that his counsel did not submit a draft of proposed jury instructions, as did Brown's attorney. The failure to submit instructions does not in itself make out a claim of ineffective assistance. The court did not request a draft of proposed instructions, the government did not submit any, Kenngott does not claim that Brown's proposed instructions were inadequate, and, as we have already explained, the instructions as given were adequate. Defense counsel may have agreed to share some of the trial responsibilities.

Moreover, the failure of Kenngott's attorney to submit instructions does not, as Kenngott implies, show that his attorney failed to vigorously represent Kenngott's interests by sitting back and merely relying on the work of Brown's attorney. Far from sitting back, Kenngott's attorney was always the first to present opening and closing arguments for the defendants, and was always the first attorney to cross-examine the government's witnesses. Kenngott's counsel presented and argued motions for acquittal both at the end of the government's case and at the close of the evidence, with Brown's attorney simply joining in Kenngott's motions. By providing both argument and citations, Kenngott's counsel aided Brown's attorney in the admission of some defense evidence. Moreover, although Kenngott's counsel did not submit any typed instructions, he did specifically request an instruction on good faith during the jury instruction conference, and provided a reference to Devitt and Blackmar.

We have carefully examined the record and have found that Kenngott's attorney participated in every phase of the trial: he interposed timely, frequently sustained objections, conducted extensive cross-examination, presented comprehensible opening and closing arguments to the jury that established a theory of the case, moved and argued

for acquittal twice during the trial, moved for mistrial when the jury retired, and made the necessary motions for new trial, stay of execution, and appeal. Kenngott's counsel did not sit back and watch his client get convicted, as Kenngott now suggests. In fact, when the trial judge asked the government whether the government's final witnesses would be lengthy, the government quipped that it would be up to Kenngott's attorney.

Brown does not complain about his counsel although, since counsel worked together, Brown's counsel might be subject to the same criticisms. Even competent counsel can lose a weak case.

V. *Venue*

The remaining issues are clearly without merit. First, Kenngott contends that his conviction should be reversed because his case was tried by a court without proper venue. Kenngott alleges that neither he nor Brown committed an overt act in the Central District of Illinois in furtherance of their conspiracy sufficient to establish venue there, and that the defect in venue was apparent from the face of the indictment. However, where the defect in venue can be gleaned from the face of the indictment, objection to venue is waived "if not presented before the close of the Government's case and perhaps if not presented before commencement of the trial." *United States v. McDonough*, 603 F.2d 19, 22 n.1 (7th Cir. 1979) (citation omitted). Since this is the first time Kenngott raised his improper venue claim, we can dismiss it without considering the merits. However, since both Kenngott and the government briefed the merits (the government failed to recognize that Kenngott did not properly reserve the issue for appeal), and since Kenngott also raises the failure to object to venue as an example of attorney incompetence, we will take a brief look at the arguments.

Venue is proper in any district in which the offense was begun, continued, or completed. 18 U.S.C. § 3237(a).

Nos. 82-1581 & 82-1582

Proper venue is not limited to districts where the defendants were physically present when they committed unlawful acts. So long as an overt act in furtherance of the conspiracy is intended to have an effect in the district where the case is finally brought, venue is proper. *See, e.g., United States v. Lewis*, 676 F.2d 508, 511 (11th Cir.), *cert. denied*, 103 S. Ct. 313 (1982) (phone call from defendant in Florida to Texas sufficient to establish venue in Texas); *United States v. Cordero*, 668 F.2d 32, 43-44 (1st Cir. 1981) (as amended); *United States v. Schmucker-Bula*, 609 F.2d 399, 402 (7th Cir. 1980); *United States v. Spiro*, 385 F.2d 210, 212 (7th Cir. 1967). Kenngott admits that certain victims of the fraudulent loan brokerage scheme transferred money to Milwaukee from the Central District of Illinois, and that the indictment alleges that the defendants made phone calls to victims in the Central District. Thus, from the face of Kenngott's own brief, it is apparent that venue was proper.

VI. *Prosecutor's Closing Argument*

Brown alleges that the prosecutor's final argument misstated the law and prejudiced Brown. At the close of his rebuttal, the prosecutor asked the jury to "ask yourselves, did they [the defendants] disprove anything that was existing at the close of the Government's case?" We agree that this was a misstatement and constituted error on the prosecutor's part. Since the prosecutor assuredly knew better, it was at least gross negligence. But we do not agree that the defendants were prejudiced by the comment.

Although the government, for some inexplicable reason, has failed to respond to Brown's facially serious charge, we have examined the record and find that reversal is not warranted. The judge immediately admonished the jury that "[t]he Defendants don't have to disprove or prove a thing. As you will see from the instructions, I want to highlight that for you. The burden is on the Government to prove the elements of the case, so maybe

he misspoke or the words slipped in there, but don't get the idea that the Defendants in this case had to disprove a thing. They don't have to disprove anything." That instruction was well said and timely. Moreover, the jury charge, which immediately followed this admonition, again emphasized that the burden of proof beyond a reasonable doubt is on the government, and remains on the government throughout the case.[10] Under these circumstances, the prosecutor's comment did not deprive either defendant of a fair trial. If that type of comment, however, appears again in any subsequent case, we may be inclined to view it as more than gross negligence.

VII. *Sufficiency of Evidence*

Finally, the defendants contend that the record lacks sufficient evidence to sustain their convictions. Brown failed to present any specific argument, but Kenngott claims that the record lacks evidence of specific intent to defraud, and that "although the prosecution may have shown there was no such thing as an 'I.C.C. 290' *bond*, it did not demonstrate by any evidence that the *procedure* referenced by the term was invalid, non-existent, or fraudulent" (emphasis in Kenngott's brief).

Because the government prevailed below, we must consider the sufficiency of the evidence in the light most favorable to the government. *Glasser v. United States*,

---

[10] The judge specifically instructed the jury that:

> The defendants are presumed to be innocent of the charges against them. This presumption remains with them throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendants are guilty.
>
> The government has the burden of proving the guilt of each defendant beyond a reasonable doubt, and this burden remains on the government throughout the case. The defendants are not required to prove their innocence.

Nos. 82-1581 & 82-1582

315 U.S. 60, 80 (1942). "Only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt, may an appellate court overturn the verdict." *Brandom v. United States*, 431 F.2d 1391, 1400 (7th Cir. 1970).

The evidence was clearly sufficient, as we have already suggested, to support the jury's finding that Kenngott and Brown were guilty beyond a reasonable doubt of all charges. Intent to defraud may be inferred from the circumstances surrounding the defendants' actions. *United States v. Wrehe*, 628 F.2d 1079, 1082 (8th Cir. 1980). The testimony and evidence at trial indicated that both Kenngott and Brown misrepresented the ICC-290 to be an expensive bond or a loan guarantee, not simply a "procedure," as Kenngott now claims. The conclusion that the defendants' misrepresentations were made in furtherance of a scheme to deceive and defraud unsuspecting victims is inescapable. None of the loans were funded, and none of the money advanced by the victims to Kenngott and Brown was ever refunded. *Cf. United States v. Key*, 725 F.2d 1123, 1127-28 (7th Cir. 1984) (indirect evidence sufficient for jury to find intent to defraud).

The convictions of both Kenngott and Brown are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 10, 1984

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 82-1581 and 82-1582

vs.

IVAN W. BROWN and GORDON M. KENNGOTT,
Defendants-Appellants

Appeal from the United States District Court for the Central District of Illinois, Danville Division.
No. 81 CR 20035
Harold A. Baker, *Judge.*

ORDER

We order that the opinion published in this case on May 4, 1984, be amended as follows:

(1) On page 14, line 4, change "312" to "302", and "316" to "306".

(2) On page 14, line 21, add a new footnote 9 at the end of the sentence. New footnote 9 reads:

On petition for rehearing and rehearing en banc, Kenngott argues that he has met the standard for ineffective assistance of counsel set forth in *Strickland v. Washington,* 104 S. Ct. 2052 (1984), which was decided after we published this case in slip opinion form. In *Strickland,* the Supreme Court held that to prevail on an ineffective assistance of counsel claim, a defendant must prove that his counsel's representation fell below an "objective standard of reasonableness," and that but for

counsel's errors, the result of the proceeding probably would have been different. *Id.* at 2065, 2068. Without deciding whether *Strickland* should have retroactive effect, and without deciding whether the Supreme Court's "objective standard of reasonableness" is equivalent to our standard of "grossly incompetent professional conduct," we note that the result in Kenngott's case would have been the same even under *Strickland* because of Kenngott's failure to show prejudice sufficient to meet the second prong of the *Strickland* test.

(3) Renumber old footnotes 9 and 10 accordingly.

On consideration of the petitions for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DANVILLE DIVISION

FILED
NOV 4, 1981
ROBERT J. KAUFFMAN, Clerk
U. S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, *Plaintiff*,

v.

GORDON M. KENNGOTT and IVAN W. BROWN, *Defendants*.

CRIMINAL NO. 81-20035

Vio: Title 18, Sections 371, 1343, & 2314, United States Code.

INDICTMENT

The Grand Jury charges:

COUNT I

1. From on or about January 1, 1979, through the present, GORDON M. KENNGOTT, conducted business in the states of Illinois and Wisconsin and elsewhere, under the name of the Kenngott Financial, Inc., Wauwatosa, Wisconsin.

2. During the same period, IVAN W. BROWN, conducted business in the states of Illinois and Wisconsin, and elsewhere, under the name of the International Barters, Ltd., Milwaukee, Wisconsin.

3. During the same period, DONALD J. JOHNSON, conducted business in the states of Kansas and Illinois, and elsewhere, under the name of Donald J. Johnson & Associates, Kansas City, Kansas.

4. That at all times material herein, the principal purpose of the defendant, Gordon M. Kenngott, and Kenngott Financial, Inc., and Ivan W. Brown, and International Barters, Ltd., and Donald J. Johnson, and Donald J. Johnson & Associates, was to provide a loan brokerage service.

5. That the loan brokerage service referred to in Paragraph 4 existed to find loans for customers of from $18,000,000.00 to $900,000,000.00.

6. That in order to process these loans, the defendants required advance fees to be paid in the form of a fee for an ICC 290 bond.

7. From on or about January 1, 1979, up to and including the date of the filing of this Indictment, in the Central District of Illinois, and within the jurisdiction of this Court, GORDON M. KENNGOTT and IVAN W. BROWN, hereinafter referred to as the defendants, knowing, wilfully and unlawfully devised and intended to devise a scheme and artifice to defraud, and to obtain money from numerous persons, hereinafter called the "clients," who could be induced to pay advance fees, and to obtain money and property from said investors by means of false and fraudulent pretenses, representations, and promises, well knowing at the time that the promises, representations, and pretenses, would be and were false and fraudulent when made, which scheme and artifice to defraud and to obtain money and property so devised and intended to be devised, was in substance as follows:

8. That the defendants did cause others to refer to clients to them; that is, persons who wanted to borrow money in the amounts ranging from $18,000,000.00 to $900,000,000.00.

9. From on or about the 1st day of January, 1979, and continuously thereafter up to and including the date of the filing of this Indictment, in the Central District of Illinois, and elsewhere, the defendants, wilfully and knowingly did combine, conspire, confederate, and agree together with each other and with Joseph Alexander Synan, Jr., and Donald J. Johnson, named as co-conspirators, but not as defendants herein, and with diverse other persons to the Grand Jury unknown, to commit the following offenses against the United States:

A. That having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, did transport and cause to be transported, and induce a person to travel in and be transported in interstate commerce, in the execution and concealment of a scheme and artifice to defraud that person of money or property, having a value of $5,000, in violation of Title 18, United States Code, Section 2314; and

B. Having devised the aforesaid scheme, did transmit and cause to be transmitted by means of a wire in interstate commerce, a writing, sign, signal, picture, and sound, for the purpose of executing such scheme or artifice, in violation of Title 18, United States Code, Section 1343; and

C. Having devised and intended to devise the aforesaid scheme, for the purpose of executing such scheme or artifice and in attempting to do so, did place and cause to be placed in any Post Office and authorized depository for mail matter, a matter or thing to be sent or delivered by the Postal Service, and did take and receive therefrom, such matter or thing; in violation of Title 18, United States Code, Section 1341.

OVERT ACTS

In furtherance of the conspiracy, and to effect the objects thereof, the defendants and co-conspirator performed the following overt acts:

1. That Michael Forman and Ruben E. Smith of Kankakee County, Illinois, were attempting to borrow 18 million dollars for a project. In leading them to believe that the 18 million dollar loan could be funded, the defendants did the following acts:

A. In mid-October, 1979, Ivan Brown made a telephone call to Michael Forman and advised Michael Forman that the 18 million dollar loan had been approved, however, in order for the loan to be processed, Mr. Forman or his partner, Mr. Ruben Smith, would have to pay $20,000 for the purchase of an I.C.C. 290 bond. This telephone conversation caused Ruben Smith to bank wire $20,000 from the account of Ruben E. Smith Construction Company at the City National Bank in Kankakee, Illinois, to International Barters, Ltd., Account No. 075-00-103-013-86158, First Bank of Midland, Milwaukee, Wisconsin, on November 6, 1979. During said telephone conversation of October, 1979, Ivan Brown advised Michael Forman that once the $20,000 was received for the purchase of an I.C.C. 290 bond, then the loan would be closed within 15 to 30 days.

b. From October 1, 1979, through December 31, 1979, Gordon Kenngott made numerous phone calls to Michael Forman and Ruben Smith, advising them of the necessity of purchasing an I.C.C. 290 bond to close their 18 million dollar loan.

c. During the period from October 1, 1979 through November 30, 1979, Donald Johnson placed a telephone call to Michael Forman and Ruben Smith, advising them to bank wire the $20,000 for the I.C.C. 290 bond to close the 18 million dollar loan that Messrs. Forman and Smith were seeking. That it was Donald Johnson's function to act as a go-between Gordon Kenngott and Ivan Brown on one hand, and Ruben Smith and Michael Forman on the other.

d. That during January, 1980, a meeting was held between Michael Forman, Ruben Smith, Ivan Brown, and Gordon Kenngott at Gurnee, Illinois. During said meeting, Ivan Brown and Gordon Kenngott indicated that the loan could not be funded

because President Jimmy Carter had frozen all Iranian assets in the United States. Ivan Brown and Gordon Kenngott further indicated that the Iranians were the lending source for the 18 million dollars that Forman and Smith were seeking. Ivan Brown and Gordon Kenngott indicated that they would attempt to seek additional sources of funding for the loan and that the I.C.C. 290 bond previously purchased would be applied toward a loan from another source.

e. During this time period, Ivan Brown and Gordon Kenngott made numerous telephone calls to Michael Forman and Ruben Smith. During these phone calls, they indicated that the I.C.C. 290 bond would guarantee the principal of the loan; and that the loans involved would be self-liquidating loans that would end after 20 years.

2. That Thomas R. Brown, Seymour, Illinois, was assisting others to borrow funds in excess of 800 million dollars to build a refinery for the Virgin Islands Refining Company. That the defendants, Gordon Kenngott and Ivan Brown, along with Donald Johnson, in leading Thomas R. Brown to believe they could provide funding for the loan, performed the following acts:

a. That during November, 1979, through February, 1980, Joseph Synan explained to Thomas R. Brown, based on information provided by Donald Johnson, that an I.C.C. 290 bond would need to be purchased in order to guarantee funding on the Virco loan.

b. That Donald Johnson advised Joseph Synan on December 13, 1979, that $190,000 would need to be bank wired from Thomas R. Brown to the account of International Barters, Ltd., account number 075-00-103-013-86158, First Bank of Midland, Milwaukee,

Wisconsin, on December 14, 1979, in order to assure processing of the Virco loan. Johnson indicated that funding would be made available within days after the purchase of the I.C.C. 290 bond. Donald Johnson advised Joseph Synan that the $190,000 had to be received prior to December 15, 1979, as President Jimmy Carter was curtailing the entry of any foreign money into the U.S., plus curtailing the future use of the I.C.C. 290 bond guarantees.

c. That on February 18, 1980, Gordon Kenngott, while meeting with Thomas R. Brown at Gordon Kenngott's residence in Wauwatosa, Wisconsin, indicated that funding for the Virco loan would be received through the World Islamic Committee (Saudi Arabia). He further indicated that bank verification was expected on February 20, 1980.

d. That on March 25, 1980, Ivan Brown caused a letter to be sent via the U.S. mail to Thomas R. Brown, stating that International Barters, Ltd., had assigned him a London Irish Bank Letter of Guarantee developed for a 1.161 billion dollar loan.

e. That on April 2, 1981, Gordon Kenngott, during a telephone conversation with Thomas R. Brown, indicated that International Barters, Ltd., had received the $190,000 bank wired on December 14, 1979. That this transfer of $190,000 was part of a legitimate loan package that had not been processed through negligence on the part of Ivan Brown. Gordon Kenngott further indicated that at the time the money was wired, he was the owner of International Barters, Ltd., and that he had subsequently sold the business to Ivan Brown, who was then responsible for developing the loan package.

All this in violation of Title 18, United States Code, Section 371.

COUNT II

That between December 14, 1979, and May 31, 1980, in the Central District of Illinois and within the jurisdiction of this Court, GORDON M. KENNGOTT and IVAN W. BROWN devised and intended to devise the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did cause to be transported by means of a wire, $190,000 in United States currency; to wit, a bank wire from Champaign County, Illinois, to Milwaukee, Wisconsin, to the account of International Barters, Ltd.; in violation of Title 18, United States Code, Section 1343.

COUNT III

That on or about the 14th day of December, 1979, in the Central District of Illinois, and within the jurisdiction of this Court, GORDON M. KENNGOTT and IVAN W. BROWN, did cause $190,000 in United States currency to be transported in interstate commerce from Champaign County, Illinois, to Milwaukee, Wisconsin, knowing the same to have been stolen, converted, and taken by fraud; in violation of Title 18, United States Code, Section 2314.

COUNT IV

That on or about the 6th day of November, 1979, in the Central District of Illinois, and within the jurisdiction of this Court, GORDON M. KENNGOTT and IVAN W. BROWN, having devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did cause $20,000 in United States currency to be transmitted by means of a wire; to wit, a bank wire transfer from Kankakee

County, Illinois, to Milwaukee, Wisconsin, to the account of International Barters, Ltd., at the First Bank of Midland, Milwaukee, Wisconsin, for the purposes of executing such scheme or artifice to defraud; in violation of Title 18, United States Code, Section 1343.

COUNT V

That on or about the 6th day of November, 1979, in the Central District of Illinois, and within the jurisdiction of this Court, GORDON M. KENNGOTT and IVAN W. BROWN did cause $20,000 to be transported in interstate commerce from Kankakee County, Illinois, to Milwaukee, Wisconsin, knowing the same to have been stolen, converted, and taken by fraud; in violation of Title 18, United States Code, Section 2314.

A True Bill,

_____

FOREPERSON

_____

UNITED STATES ATTORNEY

A True Copy
Attest:
Robert J. Kauffman, Clerk
U. S. District Court
Central Dist. Of Ill.
DATE 11-4-81